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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 394

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EXPRESS PUBLISHING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered on June 12, 1942, dismissing the Board's petition that the Express Publishing Company be adjudged in contempt for violating a decree entered by that court which enforced a bargaining order issued by the Board against the Company (R. 304).

OPINION BELOW AND PRECEDING OPINIONS

The opinion of the circuit court of appeals on the present contempt application (R. 300–304) is not yet reported. The opinions of the circuit court of appeals and of this Court in the preceding en-

forcement proceeding are reported, respectively, in 111 F. (2d) 588, and 312 U. S. 426. The decision of the Board prior to the enforcement proceeding is reported in 13 N. L. R. B. 1213.

JURISDICTION

The judgment of the circuit court of appeals (R. 304) was entered on June 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925,[1] and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

Whether the circuit court of appeals acted arbitrarily and in abuse of the functions entrusted to it under the National Labor Relations Act in holding that the employer was not in contempt of the court's decree.

A subsidiary question raised by the decision below is whether the circuit court of appeals may refuse to adjudge an employer in contempt where the employer's conduct, subsequent to the issuance of the court's decree, is substantially similar to that adjudged to be violative of the Act in the proceedings which led to the entry of the decree.

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[1] This Court has jurisdiction in the present proceeding under Section 240 (a) of the Judicial Code, as amended. See *St. Louis, K. C. & C. R. R. Co.* v. *Wabash R. R. Co.*, 217 U. S. 247, 251; *In re Chetwood*, 165 U. S. 443, 462.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra,* pages 19–20.

STATEMENT

On July 28, 1939, the Board issued its Decision and Order (13 N. L. R. B. 1213) requiring Express Publishing Company, and its officers, agents, successors, and assigns to cease and desist from engaging in certain unfair practices; upon request to bargain collectively with the San Antonio Newspaper Guild (herein called the Guild) and embody any understanding reached in a signed agreement; and to post notices. Upon petition of the Board for enforcement of its order, the Fifth Circuit on May 7, 1940, rendered its opinion (111 F. (2d) 588) and entered its Decree (R. 2–3) modifying the Board's order to eliminate the cease and desist and the posting of notices provisions, but enforcing the affirmative bargaining provisions. On writ of certiorari granted on the Board's application, this Court on March 3, 1941, handed down its opinion (312 U. S. 426) directing certain modifications in the Board's order not material to the bargaining provisions of the order, and otherwise enforcing the order. On June 17, 1941, the Fifth Circuit entered its Decree on Mandate (R. 3–6) in conformity with the opinion of this Court, including

an affirmative collective bargaining requirement identical with that contained in the decree of May 7, 1940, in addition to a notice posting requirement and injunctions to cease and desist from refusing to bargain collectively and from interfering with the efforts of the Guild to bargain collectively.

Thereafter the Company and the Guild met in four post-decree conferences. There is no dispute as to the facts, for the four conferences are stenographically reported (R. 17–260). In summary, the conferences proceeded as follows:

At the first conference, on April 7, 1941, the Guild submitted a lengthy proposed agreement (R. 19–33). In response the Company read a prepared statement setting forth objections to the proposed agreement (R. 33–34). The prepared statement concluded as follows:

> Apart from the details of the proposed agreement, it is our belief that the first question to be considered is whether it is to the interests, either of the publisher or the employees in the editorial departments, to establish arbitrary rules governing the terms of employment. In professional work of this character, is it not best to leave to both parties entire freedom of action, thus preserving to the publisher the freedom of its press and control of its editorial and news policies, and at the same time leaving to the employees full freedom to resign from their employment whenever the terms of employ-

> ment are not satisfactory to them. Under such an arrangement both the publisher and the employees would retain their complete freedom of action, except, of course, that the publisher, in accordance with its present practice, would not discriminate as between Guild and non-Guild members.

This quotation, as the facts will show, represented the Company's underlying position to which it adhered throughout all the conferences.

After reading its prepared statement, the Company orally reiterated that it rejected the Guild's proposal, whereupon the Guild withdrew it (R. 35). The Company expressed its willingness to submit a counterproposal, but the Guild stated it would rather itself submit a second proposal to the Company (R. 42). When the Guild asked, however, what provisions in its first proposal would be acceptable to the Company for inclusion in the second proposal, the Company again declared that, in its view, it was "more important than any particular detail" to determine whether "arbitrary rules governing terms of employment" should be established, "whether both sides are not better off without some agreement fixing wages according to longevity of service, or any other arbitrary rule; and fixing employment or discharge in that way" (R. 45–46). It further stated its view to be that "without fixed contracts," there is "more security, and it is better to the interests of both parties" (R. 46). The Guild expressed its disagreement

with that view (R. 48–49), and the conference ended.

At the second meeting held on April 14, at which the Guild submitted its second proposed agreement (R. 54–61), the Company again read a prepared statement rejecting it as a whole (R. 61–63). The provisions were then taken up and discussed paragraph by paragraph (R. 66–131). Throughout the conference, the Company reiterated its opposition to "any of these fixed scales" (R. 95, 131), to making a contract that "put it in a strait jacket" (R. 88, 95), and to assuming any binding obligations concerning wages, pay cuts, pay increases, severance pay, vacations, and discharges (R. 78, 88–89, 95, 101, 104, 105–106, 114, 115–116, 131–132); it also stated that it "reserves the right to terminate it [a contract] at any time" (R. 105). Of the approximately 40 sections of the Guild's proposed agreement, it pronounced unobjectionable only the provision excluding certain executive employees from the coverage of the agreement (R. 55, 72-73, 75, 76, 79–80); the section permitting employees to negotiate for individual increases (R. 56, 89–90); the requirement that a record of overtime be kept, which the Fair Labor Standards Act requires (R. 57, 92); the provision that a committee be appointed by the Guild to take up employee matters with the Company (R. 58, 108); and the clause that there should be no discrimination because of union membership, also of course required by law

(R. 60, 116). Even with respect to these "unobjectionable" provisions, however, the Company refused or evaded the Guild's requests that the Company initial the provisions as tentatively satisfactory pending agreement upon a whole contract (R. 73–78, 89–90, 92–94, 99, 106–107); it asserted that "a contract has to be agreed on as whole, or not at all" (R. 73, 76, 89, 92–93, 106).

During the meeting, the Company several times offered to prepare a counterproposal, and it was agreed that it should do so (R. 92, 106, 110–111, 130–131, 135).

On April 21, the parties met to consider the Company's "counterproposal" (R. 141–144). Its preamble expressly declared that "it is especially important that it [the Company] * * * not bind itself as to what action it will take from time to time in the future" (R. 141). In accordance with this premise none of the counterproposal's basic provisions committed the Company to anything for any length of time: Section A provided as to hiring, salaries, increases, vacations, sick leave, and discharges, that while it was the Company's "intention" to "pursue its long time and present policies," the Company nevertheless retained "complete freedom of action in such matters with power to employ and discharge and make changes in salaries at any time, either with or without notice, as it may deem best * * *" (R. 141), Section C rested the Company's "standard of rela-

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tionship to and dealing with" the employees upon their "loyalty, competency and usefulness * * * in the judgment of the management" (R. 142), Section E proposed certain terms of vacation with pay "until further notice from the Company" (*id.*), Section F granted sick leave with pay "for such period as the management shall decide in each particular case" (*id.*), Section G provided for severance pay "except in cases in which the circumstances do not warrant it as the management may decide" (R. 142–143), Section H stated that increases in pay "from time to time will be considered by the management in relation to business conditions affecting the Company" (R. 143), Section I provided that the management would arrange for reduction in force because of business conditions or changes in policy "whenever the Company deems advisable" (*id.*). During the ensuing discussions the Company, while asserting its openmindedness and willingness to be persuaded (R. 151–152, 159–160, 163, 171, 173–174), nevertheless adhered inflexibly to the terms of the counterproposal except only that it indicated its willingness to clarify one provision which might be misconstrued to prohibit peaceful picketing (R. 177–178). It reiterated the meaning of the counterproposal, declaring that "the Publisher alone should control what he is willing to pay" (R. 165); that "compensation and tenure of employment [should not] be regulated by fixed standards of

that sort" (R. 163); and that continuance of the "present conditions" was "subject to the will of either party to terminate them" (R. 176, 153). A principal ground on which it defended the counterproposal was that its terms were no different from those which each employee had previously secured for himself by individual bargaining (R. 146–147). The conference closed with the Company's statement that "at the present time * * * that is the best one [offer] we can make" (R. 183).

At the fourth meeting, held on April 29, the Company reiterated its original position that "it does not wish to bind itself for any specified length of time in the future. In other words, it wants to preserve its freedom of action in reference to making changes, both for itself and for the employees, each to have freedom of action" (R. 207). It repeated its "counterproposal"—that the existing oral arrangements with its employees, the varied terms of which had been fixed prior to the decree through individual bargaining (R. 209, 214–215, 216–217, 225, 240–241)—be incorporated by reference in a written contract running for no specified period but revocable at the Company's will (R. 207, 208, 210–211, 225). It met the Guild's protests that the "counterproposal" bound the Company to nothing and was not an agreement in any meaningful sense (R. 231–232, 257–258) by stating that "individual contracts made by employees throughout the United States * * * were very much

to the same effect" (R. 211); that the counterproposal accorded "advantages" in that it preserved "freedom of action in the future. The employees can quit if they like, and the employer can quit" (R. 228); that "when people try to fix a moment for their contract to run out they do not get security" (R. 230); and that while the Company "reserve[d] to itself what compensation it is willing to pay, * * * the other side to the contract reserve [d] * * * the right to determine whether they are willing to accept it * * *" (R. 242). The Company conceded that it could, a week after the counterproposal was signed, "reduce a particular individual's wage by a particular sum," but avowed that the other contracting party "would have likewise the same control over whether it was willing to accept it" (R. 242–243). After prolonged discussion, the conference closed with the Company's refusal to make "any changes" in its counterproposal (R. 255) and its assertion that "arbitrary standards for increase and decrease in pay and tenure of employment" would place employers "in a strait jacket" (R. 256).

In its petition filed August 26, 1941, the Board alleged that the Company and its officers and agents by their conduct of the negotiations had failed and refused to bargain collectively in good faith as commanded by the decree (R. 1–13); it asked that the Court adjudge the Company and its officers and agents in contempt, and take action to

make the decree effective (R. 12). On the same day, the court issued a rule, directed to the Company and its officers and agents, in particular its president and its secretary, to show cause why they should not be adjudged in contempt (R. 261). On October 30, 1941, the Company and the said two officers filed their answers to the Board's petition (R. 263–296). and thereafter the two officers also filed supporting affidavits (R. 297–299). On December 1, 1941, the court heard oral argument, and later in December received the briefs of the parties. On July 12, 1942, the court handed down its opinion holding that the allegations of contempt were not sustained by the proof (R. 300–304) and on the same day entered its judgment dismissing the petition (R. 304).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in failing to hold that the Company's conduct violated the court's decree.

REASONS FOR GRANTING THE WRIT

The National Labor Relations Act depends for its effective enforcement upon the exercise by the circuit courts of appeals of their contempt powers: the Board's order is not enforced until it is actually obeyed (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 269–270) and Congress clearly relied upon the remedy of contempt as the ultimate sanction to secure obedience. The circuit courts are therefore charged under the stat-

utory scheme with the duty of properly applying their contempt authority. This duty was not discharged in the instant case.

1. The determination of this case involved no problems of credibility. It presented only the simple question whether the Company's conduct, concerning which there is no factual dispute, constituted a failure to bargain in violation of the decree. Since the decree enjoined the Company from refusing to bargain in contravention of the Act, the holding that the Company was not in contempt necessarily implies that its behavior in the above-described negotiations satisfied the requirements of Section 8 (5). This conclusion is plainly in defiance of all settled standards as to the content of the obligation to bargain collectively under the Act.

The consistent decisions of the Board [2] and the principles stated by this Court [3] and the circuit courts of appeals in cases too numerous to mention [4] establish that a good faith effort to negotiate

[2] See *Third Annual Report of the National Labor Relations Board* (1938) pp. 94, 96–97, 102–105; *Fourth Annual Report of the National Labor Relations Board* (1939) pp. 66–68; *Fifth Annual Report of the National Labor Relations Board* (1940) pp. 43–45, 46–49; *Sixth Annual Report of the National Labor Relations Board* (1941) p. 51.

[3] See e. g., *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236.

[4] See *Fourth Annual Report of the National Labor Relations Board* (1939) pp. 137–138; *Fifth Annual Report of the National Labor Relations Board* (1940) pp. 100–101; *Sixth Annual Report of the National Labor Relations Board* (1941) p. 93.

and to enter into binding agreements concerning wages, hours, and other terms and conditions of employment is the basic requisite of Section 8 (5).

The uncontroverted facts show that the Company here not only undeviatingly declined to negotiate concerning the normal subjects of collective bargaining because of its view that any standards or scales whatever were inappropriate (*supra*, pp. 4–5, 6), but it further struck at the very heart of the bargaining process by its flat refusal to bind itself with respect to the principal terms of employment, even if an agreement could be reached. Its position throughout was that it must retain complete freedom to do whatever it pleased whenever it chose in respect of any of the major conditions concerning which the Guild sought to bargain. Even in respect of the conditions embodied in its own counterproposal, the Company would not commit itself: It qualified every important condition with a clause leaving the matter to be continued, to be modified, or to be abandoned at its own complete discretion and at its sole pleasure. In brief, its position was that even if agreement were reached concerning any condition, it would not be bound. The result was simply a demand on the Company's part that the Guild sign away its statutory right to bargain in the future by agreeing to permit the Company to make any changes unilaterally and without reference to the Guild at all.

This was neither the form nor the substance of collective bargaining. The Seventh Circuit

in *National Labor Relations Board* v. *Boss Mfg. Co.*, 118 F. (2d) 187, 189 (C. C. A. 7) has specifically held substantially similar employer conduct to constitute contempt of its decree. Similarly, other circuit courts of appeals have also frequently decided, on proceedings for enforcement of the Board's order, that closely comparable company refusals to contract for any definite period with respect to wages, hours or other conditions of employment because of the alleged nature of their business violated Section 8 (5) of the Act. *National Labor Relations Board* v. *Westinghouse Air Brake Co.*, 120 F. (2d) 1004, 1006 (C. C. A. 3); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 634–639 (C. C. A. 4); *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. (2d) 131, 136–139 (C. C. A. 7), certiorari denied, 313 U. S. 595. Cf. *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. (2d) 91, 94 (C. C. A. 5).[5]

[5] Illustrative of the extent to which the Fifth Circuit apparently considered itself free to diverge in this case from established standards of what constitutes collective bargaining is its statement that it postponed decision in this cause for 6 months until the Supreme Court decided *Fleming, Administrator* v. *Belo Corporation* "so that the parties might be better advised as to the kind of wages and hours contract which may or may not be entered into, in keeping with the Fair Labor Standards Act of 1938" (R. 303–304), and its observation that the proposed contract submitted by the Guild was "unreasonable" because it requested the closed shop and other provisions not "required by law" (R. 303). Cf. *National Licorice Company* v. *National Labor Relations Board*, 309 U. S. 350, 360.

2. Review of the instant decision is clearly of critical importance to the administration of the Act. To hold, as the court did, that the Company's conduct in this case satisfies the decree and the Act is to render the entire proceeding nugatory and to defeat the enforcement of Section 8 (5) at its final and most critical point, the contempt stage. Unless this decision is reversed, the Congressional command of *bona fide* collective bargaining with the representative of the employees has as a practical matter been deleted from the Act in the Fifth Circuit.[6]

3. The instant decision also poses the question whether the circuit court may pronounce behavior substantially identical with that held by it to be violative of Section 8 (5) on proceedings for enforcement of the Board's order insufficient to sustain a petition in contempt; for, in overruling the Board's contention that the Company violated its decree, the court sharply departed from its own earlier decision in the principal cause, in which it held with respect to the closely analogous position taken by the Company in its negotiations with the Guild prior to the Board's order and the court's decree, that an employer is not free under Section 8 (5) to refuse to make a binding agreement at least

[6] Further, resolution of the conflict between the instant decision and the holding of the Seventh Circuit in the *Boss* case (*supra* p. 14) that similar employer conduct in negotiations with the representatives of its employees constituted contempt is necessary to ensure the uniform enforcement of the Act.

concerning matters which embody existing practice: "if [the Company] was unwilling to do more than maintain its present status, [it was required] to say so, and to express a willingness to have that as the agreement * * *." 111 F. (2d) 588, 589.

4. The decision of the court below is of large importance to the proper judicial administration of the contempt sanction, not only with respect to the National Labor Relations Act but in the broader field of administrative law generally. The court's failure to accord weight to the Board's determination that the Company refused to bargain in violation of the Act and therefore of the decree, and its reservation to itself of complete independent discretion in deciding this issue of compliance, upset the basic scheme of the relation between administrative *expertise* and the reviewing court embodied in the statute,[7] and imply a bifurcated administration of the Act, in which the doctrines governing Board action and the initial judicial enforcement of Board orders are irrelevant at the final and crucial contempt stage.[8] This anomalous

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[7] Section 10 (e); *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208–209, 226; *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318, 342–343; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 596–597; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106–107.

[8] Particularly in a case such as this, where the underlying facts are undisputed and the only question presented is the application of settled doctrine, we think the Board's de-

result is clearly contrary to this Court's repeated pronouncements that the principles applicable to judicial supervision of administrative determinations differ from those governing review of decisions of inferior courts; that in proceedings of this type the reviewing court acts coordinately with the administrative body in executing the policy of Congress; and that the court is therefore required to exercise its authority in a manner which gives due regard to the special competence of the administrative body and is calculated to build up a consistent body of doctrine in the enforcement of the statute. See *United States* v. *Morgan,* 307 U. S. 183, 191; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 141–142. Review of the present case is therefore appropriate in order that the respective duties and powers of administrative agencies and courts be clarified in this unexplored field of the contempt sanction.

5. The Court has power to review the decision in the instant case: While the tribunal which has issued a decree has discretion in deciding whether its decree has been complied with and the appropriate remedy for non-compliance, its

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termination, expressed in its petition in contempt, that the Company here failed to bargain in good faith, was entitled to presumptive validity, and the court erred in making a wholly independent determination of the issue of compliance in disregard of the principles promulgated by the Board in the exercise of its administrative *expertise.*

determination, if clearly contrary to settled law, is subject to review and correction by an appellate court. *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 112.[9]

CONCLUSION

For the foregoing reasons we submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1942.

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[9] *Worden* v. *Searls,* 121 U. S. 14, 26; *Enoch Morgan's Sons Co.* v. *Gibson,* 122 Fed. 420, 423 (C. C. A. 8); *L. E. Waterman Co.* v. *Standard Drug Co.,* 202 Fed. 167, 172 (C. C. A. 6). See also *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.,* 135 Fed. 774, 779–782 (C. C. A. 2); *Gordon* v. *Turco-Halvah Co.,* 247 Fed. 487; *Winchester Repeating Arms Co.* v. *Olmstead,* 203 Fed. 493, 494 (C. C. A. 7); *In re Sobol,* 242 Fed. 487, 489 (C. C. A. 2).